



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We make Indiana a cleaner, healthier place to live.

Frank O'Bannon
Governor

Lori F. Kaplan
Commissioner

100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015
(317) 232-8603
(800) 451-6027
www.state.in.us/idem

To: Interested Persons

From: Lori F. Kaplan
Commissioner

Date: June 5, 2001

Subject: NPDES Permit for Discharges of Dredged and Fill Material to Isolated Waters No Longer Subject to Federal Jurisdiction

Overview:

As noted in the memo dated April 11, 2001, IDEM Actions Related to SWANCC Supreme Court Decision, I stated that the Indiana Department of Environmental Management (IDEM) would develop an interim regulatory process to continue protection of water resources affected by the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) United States Supreme Court decision.

This memorandum states our intention to use IDEM's authority to implement the National Pollution Discharge and Elimination System (NPDES) permitting program and apply it to wetland fills. IDEM is using the NPDES permit as an interim measure to provide an enforceable mechanism to incorporate conditions that will assure the state's water quality standards and laws will be implemented. This approach is planned for use until the effective date of new rules authorizing a state wetland permit program. An NPDES permit, at this time, provides the best mechanism by which impacts to wetlands can be legally authorized, and also provides for a public process and a level of certainty for all citizens of Indiana.

Applicability:

All waters of the state are subject to water quality standards (which are set forth in 327 IAC 2) and other state laws and regulations. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions. Indiana rules prohibit any discharge of a pollutant (which includes dredged or fill material) into waters of the state from a point source discharge (which includes bulldozers and backhoes) unless the discharger has obtained an NPDES permit or an exclusion applies. One of the exclusions is for discharges of dredged or fill material into waters of the state that are regulated under section 404 of the CWA. This exclusion does not apply to discharges into waters that are no longer subject to section 404 of the CWA. Therefore, a discharge of dredged or fill material into these waters is subject to the prohibition on discharging without an NPDES permit. Based on this, any activity that would result in the discharge of dredged or fill material into water bodies that are no longer subject to federal jurisdiction under the Clean Water Act (which appear to be those with no hydrological connection to other waters or other interstate commerce connection) will require an NPDES permit. Any project that requires a Section 404 permit from the Corps of Engineers and a Section 401 Water Quality Certification from IDEM will not require a separate NPDES permit.

Rationale:

The Supreme Court decision removed certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. While the Court's actual holding was narrowly limited to federal regulation of nonnavigable, isolated, intrastate waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. Some have interpreted the opinion as excluding any isolated waterbodies that are not adjacent to navigable waters of the United States. However, that interpretation is not consistent with the one taken in the joint memorandum issued by the U.S. EPA and the Corps on January 19, 2001.

Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through our Section 401 Water Quality Certification program in conjunction with the Section 404 U.S. Corps of Engineers permit program. Although some of these waters may no longer be subject to federal jurisdiction, they are still waters of the state. IDEM will continue to protect all water bodies, including those affected by the SWANCC decision, by applying the state's water quality standards. The Supreme Court decision did not question the states' authority to enforce their own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate their water resources and control water pollution.

IDEM will pursue enforcement actions against persons who discharge pollutants, including dredged and fill material, into waters of the state in violation of state regulatory or statutory provisions. Persons need to obtain an NPDES permit to provide authorization for a discharge to wetlands no longer subject to federal jurisdiction. Obtaining and complying with this permit will provide a mechanism to avoid an enforcement action for illegal discharge.

Other Information:

The NPDES permit will be available for use beginning June 11 and is intended to be available until a state wetland permit program per a revised rule is established and effective. Please find enclosed a sample application and permit. Copies of this memo and attachments, as well as information on this approach, can be found on IDEM's website:

<http://www.in.gov/idem/water/planbr/401/401home.html>

IDEM is convening a workgroup to assist in drafting a proposed rule to establish a state wetlands permit program for isolated wetlands. The proposed rule will be presented to the Water Pollution Control Board for its consideration later this year.

If there are any questions regarding specific projects, please contact Dr. Dennis Clark at (317) 233-2482.